2011 WL 766285 (La.App. 5 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fifth Circuit.

Succession of Lula Mae Johnson BANKS.

No. 2011-CA-26.
February 24, 2011.

Civil Appeal From a Judgment of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana No. 638-862 the Honorable June Berry Darensburg, Presiding Judge of Division "C"

**Original Brief on Behalf of Marilyn Banks, Appellee and Cross-Appellant**

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***2 CROSS-APPELLANT'S SPECIFICATION OF ERRORS**

1. The Trial Court erred in rendering Judgment against Marilyn Banks and not determining that the Main Demand of David Banks for Accounting and Return of Succession Funds was extinguished by Inter Vivos Payment made in accordance with valid Onerous and Remunerative Donations from the Decedent to her daughter, Marilyn Banks in return for services rendered.
2. The Trial Court erred in rendering Judgment against Marilyn Banks and not determining that the Main Demand of David Banks was extinguished or estopped by Specific Performance of the Stipulation Pour Autrui between Marilyn and David.

3. The Trial Court erred in not rendering Judgment for Marilyn Banks upon her Reconventional Demand against the estate of Lula Banks for the value of services rendered the decedent by Marilyn Banks as Succession creditor or alternatively under Unjust Enrichment.

4. The Trial Court erred in not rendering Judgment for Marilyn Banks upon her Third Party Demand against David Banks for 1/2 the value of services rendered the decedent by Marilyn Banks as contribution for services rendered a needy parent or alternatively under Unjust Enrichment.

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***6 MAY IT PLEASE THE COURT:**

## INTRODUCTION

Appellee and Cross-Appellant, Marilyn Banks ("Marilyn") submits this original brief in opposition to the Appeal filed by Appellant, David Banks ("David") and in support of her Answer and Cross-Appeal.

## STATEMENT OF THE CASE

Marilyn Banks ("Marilyn") is the daughter of Lula Banks ("Lula") (pg. 132, lines 17-21) and the sister of David Banks ("David") (pg. 157, lines 14-17). Marilyn's father, Elliot, predeceased his wife, Lula, in 1983 (pg. 133, lines 12-13). There were no other children of the marriage (pg 14).

Since 1978, Marilyn has owned her own home at 537 Olive Avenue, Harvey, La. (pg. 132, lines 10-11, 28-30). She has never been married or had any children (pg. 132, lines 23-27). Marilyn lived alone until 1986 or 1987 when Lula moved in with her after the death of Marilyn's father (pg. 133, lines 17-23).

When Lula moved in she was capable of functioning independently without daily assistance.(pg. 134, lines 1-4.) Lula remained self sufficient until she began experiencing onset symptoms of Alzheimer's sometime after 2000 (pg. 134, line 26 to pg. 135 line 10) (pg. 157, line 25 to pg. 158, line 1).

Marilyn had stopped working in 1995, and with a favorable severance package, she was able to take off a while (pg. 135, lines 14-32). She later attended Louisiana Technical College for 15 months to enhance her computer skills in hopes of returning to the work force, but Lula's condition worsened. Lula started losing her mental faculties near the end of the 15 months of school and Marilyn resigned herself to stay at home with her as Lula could not stay alone (pg. 136, lines 1-7). Marilyn helped her mother for many years in the writing of checks to pay bills, until she got worse and ***7** Marilyn's name was placed upon all of her accounts (pg. 137, lines 7-20). However, on May 15, 2002, upon the insistence of David, Lula executed a standard general power of attorney ("POA") (Ex # P-2) in favor of Marilyn (pg. 137, lines 21 -25). As Marilyn's name was already on all accounts, the POA seemed unnecessary to Marilyn (pg. 137, lines 26-30). But David testified that the POA was necessary to assist in Lula's medical care (pg. 158, lines 6-12) and **finances** (pg.169, 4-13).

In 2002, per family agreement with Lula and David, Marilyn willingly took on the task of Lula's care, predominantly alone without the assistance of a regular sitter (pg. 208, line 15 to pg. 209 line 9). Lula's worsening affliction with Alzheimer's required physical day-to day care. It consisted of bathing her, cutting her hair, washing her clothes, ironing her clothes, paying her bills, processing her medical claims, cooking her food, taking her to doctor, to dentist, transporting her for banking, visiting and all else (pg. 207 lines 8-28). When she grew worse it entailed feeding her, changing her "depends" diapers, changing soiled bed clothes, gowns, and linens, sometimes twice a night (pg. 207 line 28 to pg. 208, line 14). "It was like having a child, a baby to think for. To do the job for, to take care of, to do the work. Do the planning. Do the preparation. Do the leg work. It got to that extent." (Marilyn pg. 208, lines 10-14).

For 960 days from 2002 until December of 2004 Marilyn provided continuous 24/7 service for Lula (pg. 209 lines pg. 10-30). Finally, as Lula's declining condition required feeding tube and catheter in December of 2004, she was placed in a nursing home (pg. 144, lines 21-32, pg. 145, line 1-2). Marilyn, a cancer patient herself (pg. 221, lines 18-25), could no longer provide for her mother at home. Lula died on October 26, 2005 (pg 10) at Wynhoven.

***8** As detailed by the expert forensic accountants that testified at trial (Schafer at pgs. 120-131) (Bateman at pgs. 180-205) and their reports (Schafer P-l, D-3) (Bateman D-2, D-4), slightly over $200,000 was transferred from Lula's accounts for various purposes largely for Lula's benefit from May 15, 2002 until Lula died in October of 2005. Ms. Bateman opined that Marilyn separately received $75,050 in benefit directly from these transfers, while David separately received $16,200 in benefit (D-2). David's expert opined that Marilyn separately received $77,026 directly from these transfers, while David separately received $16,200 (P-2).

Thus there is no real dispute as to the numbers involved in the various transactions professionally reviewed. Additionally, Ms. Bateman, utilizing standard methodologies, estimated the value of services provided by Marilyn at a low of $94,000 and high of $133,707 (D-4), either easily in excess of the $77,026 received from Lula during the period in question. Nonetheless, David now seeks judgment against Marilyn for the $77,026 she received for taking care of Lula.

**ACTION OF THE TRIAL COURT**

The Trial Court rendered judgment in favor of David Banks, Individually, and against Marilyn Banks, Individually, in the amount of $29,000, inclusive of legal interest, costs and attorney fees.

David has appealed the Trial Court Judgment (pg. 72) that was rendered on March 23,2010 after an evidentiary hearing on February 26,2010 (pgs. 99-241). The Judgment is supported by both Written Reasons (pg. 80) and Amended Written Reasons (pg. 85) issued by the Trial Judge. All are attached to this cross-appeal.

In his Appeal, David seeks modification of the Trial Court Judgment as follows: (1) to substitute the Succession rather than David as judgment creditor, (2) to award legal interest, and (3) to increase the amount of judgment against Marilyn ***9** to $77,026. In her Answer and Cross-Appeal, Marilyn denies David's grounds for relief. She seeks reversal or modification of the Judgment as follows: (1) dismissing David's suit with full prejudice, or (2) awarding Marilyn judgment in full against the Succession, or against David in the appropriate proportion of 1/2, for the value of rent and services rendered by Marilyn in housing and caring for her mother, the decedent, Lula Banks.

ISSUES PRESENTED FOR REVIEW

1. Did Marilyn illegally “raid” her mother's bank accounts by power of attorney for $77,050 during the period she alone cared for her **elderly** mother stricken with Alzheimer's, or did she legally receive these funds by onerous or remunerative donation?

2. Did the parties enter into a validly enforceable contract or stipulation between them for the benefit of their sick mother that precludes judgment against Marilyn ordering the return of any funds received by Marilyn during the period in question?

3. If Marilyn is cast in judgment, should she also be granted judgment against her mother's estate for services rendered or for unjust enrichment?

4. If Marilyn is cast in judgment, should she also be granted judgment against David as co-heir for contribution or for unjust enrichment?

***10 LAW AND ARGUMENT**

**A. STANDARD OF REVIEW**

In *Johnson v. Tregre*, 98-512, p. 6-7 (La. App. 5th Cir. 1/26/99), 726 So.2d 1105, 1108, this Court summarized the applicable standard of review as follows:
“The long standing rule of law is that an appellate court cannot reverse a trial court's findings of fact in the absence of manifest error or unless they are clearly wrong. *Stobart v. State*, Through DOTD, 617 So.2d 880 (La. 1993); *Rosell v. ESCO*, 549 So.2d 840 (La.1989). On appellate review, the Court must review the entire record to determine whether the trial court's findings were clearly wrong or manifestly erroneous and whether the trial court's conclusions were reasonable. *Stobart*, supra.

If the trial court's findings are reasonable based upon the entire record, the appellate court may not reverse these findings even if the appellate court is convinced that had it been sitting as trier of fact, it would have reached a different conclusion. *Lewis v. State*, Through DOTD, 94-2370 (La.4/21/95), 654 So.2d 311; *Housley v. Cerise*, 579 So.2d 973 (La. 1991). In *Stobart*, supra, the Supreme Court explained:

‘This Court has recognized that “[t]he reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the

proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Co.,* 293[283] So.2d 716 (La.1973). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Id.' "

***11 B. FIRST ASSIGNMENT OF ERROR: EXTINGUISHMENT OF MAIN DEMAND BY ONEROUS OR REMUNERATIVE DONATION**

In these succession proceedings, David, as self-imposed administrator, has styled a separate complaint against his sister, Marilyn, as an accounting action and for return of funds based solely upon the POA (EX # P-2) by Lula to Marilyn that was prepared and executed in 2002. The instrument was signed just prior to dismissal of Lula's sitters and Marilyn solely taking upon the responsibilities to room, board and sit for Lula for 960 straight days.

The truth, as evidenced by the testimony taken at trial, is that the living and care arrangement that Marilyn and David entered into in 2002 for the care of their **elderly** mother afflicted with Alzheimer's was the much larger cause for the obligations incurred in 2002 than that POA. David testified on cross that the POA was for medical care purposes and to assist with conducting **finances** conceding that it was pretty much forgotten after its execution until the present litigation started (Pg. 169, lines 4-29). It was his primary understanding that the arrangement made was that Marilyn was going to be his mother's sole daily caretaker (Pg. 171, lines 10-17) which is something not mentioned in the POA. It is easy to see that the POA merely facilitated the room, board, care and assistance provided by Marilyn to Lula, not define it.

Lula was in a declining condition from 2002 to 2005 when she died. Until Marilyn fell ill to cancer and Lula had to be placed into a nursing home for assistance with catheters and feeding tubes, Marilyn was the primary, 24 hour, in-home caretaker at Marilyn's residence.

During a 960 day period of care (Pg. 197, lines 24-26), money was moved from Lula's accounts. What is debated is the factual intent of the parties underling the ***12** various transfers of money and the varying legal consequence thereof.

David has charged Marilyn with theft. He alleges that his caretaking sister "raided" Lula's accounts (Appellant's Original Brief, Pg. 6, lines 1-2). The evidence does not support this exaggeration of fact. Ironically, if that were the case, David would be a pirate and co-conspirator as his receipt of $16,200 from mom's accounts during the period in question so demonstrates.

Marilyn responded by asserting a claim for recognition of the room, board, care and assistance agreement that the family entered into for the care of their mother that allowed her to be paid directly from Lula' s accounts for the services that she rendered (Answer, Reconventional Demand and Third Party Demand, Paragraphs 6, 7 & 8, pg.49).

Such arrangements are not uncommon. In *Succession of Lawrence,* 650 So.2d 398,94-977 (La.App. 3 Cir. 2/1/95) *writ denied* April 20,1995, the Third Circuit held that a decedent's establishment of bank accounts with his nephew named as alternate payee was an inter vivos transfer resulting from a pure onerous contract between them for decedent's services, and thus the money in the accounts was not part of decedent's succession and that the value of gift was in remuneration of the services provided by the nephew.

In reaching its conclusion the Court differentiated between the three forms of donations involved in such familial arrangements in which care and servicesof caretaker are remunerated by the recipient of that attention. The Court in said analysis extensively reviewed the supporting jurisprudence as well. Id at page 400:
"La.Civ.Code art. 1523 defines the three kinds of donations inter vivos:

There are three kinds of donations inter vivos:

The donation purely gratuitous, or that which is made without condition and merely from liberality;

The onerous donation, or that which is burdened with charges imposed on the donee;

The remunerative donation, or that the object of which is to recompense for services rendered.

***13** The onerous and the remunerative donations are defined in the next two succeeding articles:

Article 1524. Onerous donation

The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee.

Article 1525. Remunerative donation

The remunerative donation is not a real donation, if the value of the services to be recompensed thereby being appreciated in money, should be little inferior to that of the gift.

The next article tells us that onerous and remunerative donations are not subject to the rules peculiar to donations inter vivos, except when the value of the object given exceeds by one-half that of the charges or of the services. La.Civ.Code art. 1526. In the present case, the trial judge made a finding of fact, which we cannot say was clearly wrong, that the value of the bank accounts at the time of Lawrence's death did not exceed by one-half that of the services rendered by Jones and the charges imposed upon him during Lawrence's lifetime. Therefore, the mathematical proportion between the value of the gift and that of the services rendered and charges imposed satisfied the definitions of onerous and remunerative donations. In consequence, the rules peculiar to donations inter vivos do not apply in this case.

The applicable rules are those pertaining to conventional obligations or contracts. In *Victorian v. Victorian,* 411 So.2d 473 (La.App. 3rd Cir. 1982), this circuit found that there was a remunerative and onerous donation. There was a written conveyance of land reciting that no money was paid, but that the consideration was, 'vendee agrees to take care of vendor's person and furnish him a place to stay until vendor's death.' Id., at 474. Because the consideration was thus expressed only in onerous terms, a question arose as to whether the consideration might also have been intended as remunerative for services rendered prior to the conveyance. In finding that the true intent of the parties expressed in the instrument included the recompense to the donee for services rendered before the execution of the conveyance, this circuit applied the rules pertaining to contracts in general and to sales in particular. Id., at 476.

The court in *Succession of Jones,* 505 So.2d 841 (La.App. 2d Cir. 1987) held that the transfer of a $5,000 check as an onerous and a remunerative donation was valid under the rules applicable to contracts in general. The court construed the $5,000 gift as having been given in payment of an actual obligation owed by the donor for services rendered by the donee for many years. The court said that the gift could thus be construed as a valid onerous contract, under La.Civ.Code art. 1761, for the performance of a natural obligation. And it could be construed under La.Civ.Code art. 1909 as an onerous contract because each of the parties obtained an advantage in exchange for his obligation.

***14** Finally, in affirming the trial judge in this case we rely on the *Succession of Theriot,* 532 So.2d 260 (La.App. 3d Cir.1988). In that case Elma Theriot, while she was alive, caused certain certificates of deposit that had previously been in her name alone to be reissued naming her as a payee but naming as well Catherine Trahan as an alternate payee. When Theriot died the certificates were still in the bank and had never been cashed. Catherine Trahan sued the Succession of Theriot claiming ownership of the certificates as remunerative donations. The trial judge found as a fact that Catherine Trahan provided services and assistance to Elma Theriot sufficient to qualify the gifts as remunerative donations. The trial court held that Elma Theriot by placing Catherine Trahan's name on the certificates intended to *401 transfer the certificates of deposit to Catherine Trahan. The trial

court also concluded that by naming Catherine Trahan as an alternate payee, Theriot intended to make a remunerative donation. Finally, the trial court concluded that the donation was valid as a remunerative donation because remunerative donations do not require formal acts. This court affirmed.

The decision in *Succession of Miller*, 405 So.2d 812 (La.1981), illustrates the extent to which courts will go to enforce the clear will of the parties. The case did not involve an onerous or remunerative donation, but rather, a gratuitous donation, and the rules applicable were accordingly those peculiar to donations inter vivos. A savings account stood in the name of 'Mildred M. Miller or Mrs. Albertha S. Meyer (payable to either or survivor).' Ms. Meyer withdrew the funds from the account on May 24, 1976, and Ms. Miller died the next day, May 25. Before the court was the question of whether Ms. Meyer could keep the money as a valid donation inter vivos, it being clear that, because Ms. Miller's will had been declared invalid, Ms. Meyer could not get the money by virtue of a valid donation mortis causa. Since it was a gratuitous donation, it had to meet the strict formal requirements, one of which was the necessity for an act passed before a notary public and two witnesses. Manual gift is an exception to that formal requirement. The Supreme Court in this case upheld the donation of the savings account to Ms. Meyer as an inter vivos donation by construing it as a manual gift. The court recognized that the account itself was an incorporeal movable and as such not subject to a manual gift, but reasoned that the cash withdrawn from the savings account became a corporeal movable and was subject to a manual gift. Manual gift requires delivery, and the delivery took place in this case when Ms. Meyer withdrew the savings account, although she was the one who withdrew it. In reaching this ruling the Supreme Court went to some length to explain that the donor expressed her unqualified intent, on several occasions, that Ms. Meyer have the money.

[2][3] La.Civ.Code art. 870 says that ownership of things or property can be acquired by the effect of obligations. An onerous contract is one where each of the parties obtains an advantage in exchange for his obligation. La.Civ.Code art. 1909. In this case we find that it was a pure onerous contract because the value of the gift was about equal to ***15** the services and the charges. Parties are free to contract for any object that is lawful. La.Civ.Code art. 1971. Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. La.Civ.Code art. 1983. Interpreting the manifest intent of Lawrence that his nephew Jones should be the owner of his money in Lawrence's lifetime, we find that the transfer was inter vivos. Jones was the owner of the money. It was not part of the succession of Lawrence."

Clearly these cases set a judicial temperament acknowledging a decedent's intent and propensity to reward his caretaker by manual gifts. David also expressed at trial that both he and his sister owed their mother a moral or personal obligation of support and should not be reimbursed for it. (Pg. 159, lines 12-29). It is noteworthy that a valid remunerative donation or giving in payment has also been found to have occurred in recognition of even a moral obligation. See *Azaretta v. Manalla*, 768 So.2d 179, 98 A.L.R.5th 747, 00-227 (La.App. 5 Cir. 7/25/00).

Lula was emphatic with Marilyn that she wanted Marilyn compensated for her services (Pg. 213, line 26 to Pg. 214, line 6), and there is undisputed evidence in the record of the significant value of the services provided by Marilyn for her mother (Pgs. 193-199). Accountant Jan Bateman used two alternative methods in forensically valuing Marilyn's services to Lula for the 960 day period in question from May 15, 2002 until December 31, 2004 (Pg. 197, lines 24-26).

Ms. Bateman first placed a value on Lula's 1/2 of room and board based upon actual household expenditures of $32,854.19 (Pg. 196, lines 20-23) and 1/2 of the stipulated $850 monthly rental value for Marilyn's home for the period (Pg. 116, line 24 to Pg. 117, line 14). The estimated value of room and board provided Lula by Marilyn was thus calculated at $30,027.00 (Pg. 193, line 17) . She then placed a value on the savings for sitters created by Marilyn's 24 hour care based upon a 9 hour day at the customary sitter rate of $12 per hour or $108 per day ( Pg. 197, line 16 to Pg. 198, line 18), which was also the actual rate paid Lula's prior sitter, Geraldine ***16** Black ( Pg. 197, line 19 to 23). The estimated value of sitter services for the 960 day period was $103,680 (Pg. 193, line 26). The total value of room, board and sitter services for the period was calculated at $133,707 (Pg. 193, line 28).

Alternatively Ms. Bateman valued the nursing home costs saved by Marilyn caring for Lula in Marilyn's home (Pg. 194, lines 1-13). The Wynhoven $97 per day charge actually incurred for Lula in 2005 was multiplied by the 960 days of in home care for the period resulting in a value to Lula of $94,000 in not having to go into a nursing home for the period (Pg. 194, line 8).

Regardless of method in valuing Marilyn's contribution and service to Lula's care ($133,707 for value of services provided versus $94,000 for costs of nursing home saved), the money Marilyn received in payments from Lula's account ($75,050) was far outweighed by the benefit ($133,707 or $94,000) that she provided her mother for the period in question. There was due consideration then for all remunerative donations.

What is apparent from the Trial Court's ruling is that it significantly weighed the contribution that Marilyn provided her mother (Pg. 207-08) along with determining the requisite intent of Lula to remunerate Marilyn for her services (Pg. 213, line 26 to Pg. 214, line 6) thus explaining the Judgment limiting a potential $77,026 claim against Marilyn to only $29,000 inclusive of interest, fees and costs. Such similar findings of donee's value of service and donor's remunerative intent echo in the many such cases cited in *Lawrence*, supra.

What is unclear is why the Trial Court under calculated the value of Marilyn's services. There is simply no countervailing evidence in the record discounting the value of Marilyn's services. Once the Trial Court determined Lula's reasonable intent to remunerate Marilyn as it apparently did here, any judgment that does not ***17** also find her services outweighed what she received thus allowing her to keep all manual gifts must be manifestly erroneous. The exception of no cause or right of action against the main demand should have been maintained or the main demand otherwise dismissed on the basis of extinguishment due to manual gift in remuneration for the valuable service Marilyn rendered Lula.

## C. SECOND ASSIGNMENT OF ERROR: EXTINGUISHMENT OF MAIN DEMAND BY PERFORMANCE OF STIPULATION POUR AUTRUI

Marilyn alternatively defends the main demand by seeking specific performance or damages based upon stipulation pour autrui. Her argument hinges upon the “gentleman's agreement” between Marilyn and David as attested by Marilyn (Pg. 210, line 26 to Pg. 211, line 29). Succinctly stated, Marilyn would stay at home and take 24 hour care of Lula as long as she could so that Lula did not have to go into a nursing home, and in return for that service, she would keep all of Lula's money after she died ( Pg. 207-214). Lula well knew and appreciated the agreement (Pg. 213, line 26 to Pg. 214, line 6). Although David denied any such arrangement, family friend, Geraldine Wendt, corroborated the extensive service provided by Marilyn to her mother (Pg. 221, line 18 to Pg. 222, line 26) and her discussions with Marilyn about the agreement reached with David as well as the awareness of Lula thereto (Pg. 220, lines 18-26).

Contractual stipulations pour autrui on behalf of third persons are favored. No express acceptance or consent by the third party beneficiary, or particular form of acceptance or consent is required. *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, App. 3 Cir.2001, 790 So.2d 93, 2001-0345 (La.App. 3 Cir. 6/20/01), writ denied 794 So.2d 834, 2001-2115 (La. 7/26/01). Such recognition of a third-party beneficiary's rights usually occurs where one party contracts to perform an obligation ***18** owed by another party to third person. *Guidry v. Hedburg*, App. 3 Cir.1998, 722 So.2d 1036, 1998-228 (La.App. 3 Cir. 11/4/98), rehearing denied. Stipulations pour autrui do not have to be in writing. *Joseph v. Hospital Service District No. 2 of Parish of St. Mary*, 939 So.2d 1206, 2005-2364 (La. 2006). Moreover, a verbal stipulation pour autrui may be a valid, enforceable, primary obligation under Louisiana law. *Vezina and Associates v. Gottula*, App. 5 Cir. 1995, 652 So.2d 85, 94-593 (La.App. 5 Cir. 3/1/95), writ denied 654 So.2d 332, 1995-0825 (La. 5/5/95). A stipulation pour autrui can only be revoked by the stipulator. La. C.C. art. 1979. It can also be dissolved by the mutual consent of the parties. La. C.C. art. 1978. However, the stipulation cannot be revoked after the third-party beneficiary has manifested his intention to avail himself of the benefit. La. C.C.art. 1979. Further, it cannot be dissolved without the beneficiary's consent. La. C.C.art. 1978. *Sandi v. Palmer*, App. 5 Cir.1998, 713 So.2d 822, 98-34 (La.App. 5 Cir. 5/27/98).

The factors to be considered in deciding whether an advantage for a third person has been provided by a contract between others are: the existence of a legal relationship between promisee and third party involving obligation owed by promisee to beneficiary which performance of promise will discharge; the existence of a factual relationship between promisee and third person, where there is possibility of future liability either personal or real on part of promisee to beneficiary under which performance of promisor will protect former, which secures advantage for third person which may beneficially affect promisee in material way, and where there are ties of kinship or other circumstances indicating that benefit by way of gratuity was intended. *State v. Joint Com'n on Accreditation of Hospitals, Inc.*, App. 2 Cir. 1985, 470 So.2d 169; *Cavin v. Harris Chevrolet, Inc.*, App. 1 Cir.1996, 673 So.2d 654, 1995-1878 (La.App. 1 Cir.5/10/96).

***19** Applying this law to facts above stated in the record, one notes that David promised Marilyn to "not take a nickle" (Pg. 112 line 27) from Lula's estate if Marilyn promised David to room, board and sit for Lula in her house rather than the family incurring nursing home and sitter charges (Pg. 112 line 27 to Pg. 133, line 29). These promises are gratuitously exchanged between David and Marilyn so that Lula didn't have to go into a nursing home. Lula was aware of the agreement and received full benefit of Marilyn's room, board and 24 hour sitting services for 960 days until her needs with catheters and feeding tubes exceeded all of Marilyn's abilities and she had to go to Wynhoven.

The duty to support a parent in need is an obligation imposed by C.C. Art. 229 that binds all children, thus posing the necessary legal relationship between David and Marilyn as co-obligors that incurs them future liability should Lula be rendered destitute, a direct consequence of moving all of Lula's money from Lula's accounts. The gentleman's agreement was designed to prolong Lula's resources to stave off nursing home costs, a distinct material advantage to both children, and to compensate Marilyn for caring for her mother in need.

David and Marilyn thus entered into a validly enforceable stipulation pour autrui. Marilyn now seeks and is entitled to recognition and specific performance of the stipulation by either dismissal of the main demand or alternatively judgment against the estate or David proportionally for the proven value of services rendered and/or consequential damages.

**THIRD ASSIGNMENT OF ERROR: RECONVENTIONAL DEMAND AGAINST THE ESTATE OF LULA BANKS FOR THE VALUE OF SERVICES RENDERED BY MARILYN AS SUCCESSION CREDITOR OR FOR UNJUST ENRICHMENT**

Marilyn has also brought a reconventional demand against Lula's estate as succession creditor and/or under theory of unjust enrichment should judgment be ***20** maintained against her on the main demand.

Clearly a defeat suffered to David's main demand places Marilyn in the untenable position of being judgment debtor to her mother's otherwise defunct estate. Significantly then, the position that she would otherwise enjoy as succession creditor for the proven value of services rendered to her mother for room, board, care and assistance is impeded if not defeated by the deadman statute, LSA-R.S. 13 § 3721.:

> Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless *within one year of the death of the deceased:..... (emphasis added.)*

The deadman statute does not similarly apply to claims for the property received by remunerative donation. See *Theriot* supra.

As David's original demand is filed roughly 13 months after Lula's death, then within strict construction of the statute there can be no timely reconventional demand filed by Marilyn to recoup the value of her services to the decedent. Such application of law leaves Marilyn without codal remedies for her loss.

As the Fifth Circuit recently reasoned *in Bourgeois v. Bourgeois,* 40 So.3d 150, 09-986 (La.App. 5 Cir. 3/23/10), in absence of applicable codal authority, "La.C.C. art. 2298, unjust enrichment, is the applicable law:
A person who has been enriched without cause at the expense of another person is bound to compensate that person....

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered."

If any monetary judgment is upheld against Marilyn, she is likewise entitled to judgment against Lula's estate for $133,707 or $94,000 as payment for the uncontroverted value of services rendered for Lula.

***21 FOURTH ASSIGNMENT OF ERROR: THIRD PARTY DEMAND AGAINST DAVID BANKS FOR 1/2 OF THE VALUE OF SERVICES RENDERED BY MARILYN AS CONTRIBUTION FOR SERVICES RENDERED A NEEDY PARENT OR FOR UNJUST ENRICHMENT**

Should Marilyn ultimately suffer a monetary judgment rendered against her on any portion of David's main demand, then as co-obligor with David under La. C.C. Art. 229, Marilyn further seeks and is entitled to a money judgment against David Individually in the amount of 1/2 of the amount so cast, as his contribution for the uncontroverted value of proven services rendered by Marilyn for Lula.

In *Succession of Glaudi,* 469 So.2d 1127(4th Cir. 1985), the Court utilizing the principles embodied in La. C.C. Art. 229 as distinguished in La.C.C. Art. 3544; *Muse v. Muse,* 215 La. 238,40 So.2d 21 (1949); *Succession of Catalinotto,* 144 So.2d 678 (La.App. 4th Cir.1962); *Succession of Guidry,* 4 So. 893 (La. 1888) and *Succession of Dugas,* 215 La. 13,39 So.2d 750 (1949) explained contribution among siblings for care of a needy parent:

> Guidry does not suggest that the court intended to restrict the child's claim against his siblings to an action against the siblings' share in the parent's succession. Such a limitation would be contrary to the obligation imposed by C.C. Art. 229. As explained in Guidry, Art. 229 binds all children, in solido, for the wants and necessities of the parent. The liability of brothers and sisters for contribution for their virile shares is their personal obligation to the child who has supplied the support to the parent in need. Muse v. Muse, supra. It follows that this liability can be satisfied either by an action brought directly against the brothers and sisters or by a claim against their share in the parent's succession.

***22 CONCLUSION**

Marilyn rendered virtually unassisted care in Marilyn's home for her **elderly** mother for 960 straight days valued at trial in a reasonable range of $94,000 to $133,707 for which she was paid only $55,000 from the funds that she handled.

Her brother, David, who did virtually nothing but sit idly by for that period, has now installed himself as administrator of his deceased mother's defunct estate and seeks a monetary judgment against Marilyn on behalf of the estate for $77,026 labeling Marilyn as a thief.

These facts are evident from the record: that Lula Banks undoubtedly benefitted by the family arrangement between David and Marilyn placing her in Marilyn's sole care for 960 straight days between 2002 and 2005 rather than a nursing home, and

that the inter vivos transfer of $77,026.00 from Lula's account to Marilyn during that period was fully intended to compensate Marilyn for her services.

Thus it was manifest error to grant judgment against Marilyn. Alternatively, it was manifest error to not grant Marilyn judgment against the estate or David on the Reconventional and Third Party demands filed as prayed for.

**Appendix not available.**